

**IN THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF OKLAHOMA**

<b>DALE E. HARPER,</b>	)	
	)	
<b>Plaintiff,</b>	)	
	)	
<b>v.</b>	)	<b>Case No. CIV-12-449-HE</b>
	)	
<b>JAMES RUDEK,</b>	)	
<b>Warden of OSR, et al.,</b>	)	
	)	
<b>Defendants.</b>	)	

**REPORT AND RECOMMENDATION**

Proceeding under 42 U.S.C. § 1983, the Plaintiff has initiated the present action complaining of alleged civil rights violations. Doc. 1. District Court Judge Joe Heaton has referred the matter to the undersigned Magistrate Judge for proceedings consistent with 28 U.S.C. § 636(b)(1)(B) and (C). At issue are the Plaintiff's Motion for Default Judgment, Doc. 75, and Request for Entry of Default, Doc. 78. The undersigned recommends denial of the motions.

**I. The standard for an entry of default and default judgment.**

When a party fails to plead or otherwise defend within the specified time, the Court Clerk "must" enter default. Fed. R. Civ. P. 55(a). Thereafter, if the plaintiff's claim is not for a "sum certain," the Court may grant default judgment and assess damages. *See* Fed. R. Civ. P. 55(b)(1)-(2).

**II. The Plaintiff's motions for entry of default and default judgment.**

The Plaintiff argues that an entry of default must be made, and default judgment granted, against Defendants Tracy McCollum and Nina Nagel-Silva. Docs. 75, 78. According to the Plaintiff, the Court ordered these parties to either answer or file a dispositive motion within thirty days of January 30, 2013, and one was not forthcoming. Doc. 75, at 1. However, Defendants McCollum and Nagel-Silva filed a Motion to Dismiss on February 19, 2013 – exactly thirty days from January 30, 2013. *See* Doc. 70. Because of the Defendants' timeliness, the Court Clerk has no basis to enter a default and the Court has no basis to grant default judgement.

**III. Recommendation and Notice of Right to Object.**


For the reasons set forth above, it is the recommendation of the undersigned that the Plaintiff's motions for entry of default, Doc. 78, and default judgment, Doc. 75, be denied. If the recommendation is adopted, the undersigned further recommends that the Plaintiff be granted an additional twenty days in which to respond to the Defendants' Motion to Dismiss, Doc. 70.

The parties are advised of their right to file an objection to the Report and Recommendation with the Clerk of this Court by the 30th day of April, 2013, in accordance with 28 U.S.C. § 636 and Local Civil Rule 72.1. The parties are further advised that failure to make timely objection to the Report and

Recommendation waives the right to appellate review of both factual and legal questions contained herein. *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991).

This Report and Recommendation does not dispose of all issues referred to the undersigned in the present case.

Entered this 10th day of April, 2013.

  
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SUZANNE MITCHELL  
UNITED STATES MAGISTRATE JUDGE